

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHELLY MAYTUM)	
Claimant)	
)	
VS.)	
)	
CARLSON GROCERY, INC.)	
Respondent)	Docket No. 1,035,858
)	
AND)	
)	
STATE FARM FIRE & CASUALTY CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 5, 2009 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on July 17, 2009 in Wichita, Kansas.

APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. P. Kelley Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that the preliminary hearing exhibits are to be considered part of the record. Claimant also conceded that at this point in the proceedings, she is asserting a series of repetitive injuries culminating on her last

date worked in March 2007.¹ Thus, the parties agreed that that portion of the ALJ's Award that denies any benefits for a single acute injury occurring on January 20, 2007 can be summarily affirmed. The Board need only deal with the issue of whether claimant sustained a series of repetitive injuries arising out of and in the course of her work activities and if so, the nature and extent of her impairment.

ISSUES

The ALJ denied claimant's request for compensation after she found that claimant's left wrist complaints were not causally related to her otherwise compensable work accident that occurred on January 20, 2007.² The claimant has appealed this decision and argues the ALJ erred. Claimant maintains her claim encompasses not just the effects of the initial accident on January 20, 2007, but her work activities each and every day thereafter until the end of March 2007. Due to those repetitive work activities, claimant maintains she is entitled to a 19 percent permanent partial impairment to her left upper extremity.

Respondent contends the Board should affirm the ALJ's Award in all respects. Respondent maintains that claimant's left wrist complaints did not arise until well after her January 20, 2007 accident and that she failed to sufficiently prove her alleged repetitive work activities, post-January 20, 2007, bear any causal connection to her ongoing left wrist problems.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no dispute that claimant sustained a compensable injury on January 20, 2007. Claimant was walking and fell, striking her head and back. She received immediate medical treatment at a local hospital and during that process, claimant voiced no complaints regarding her left wrist. After a few days off work, claimant returned to her position as a deli clerk and continued to work her normal duties.

Claimant's medical treatment continued through Dr. Don Hodson. She concedes that her first complaint of left wrist pain did not come until March 30, 2007, when she reported to Dr. Hodson that her thumb went out of joint. This event occurred while claimant was at home, stepping out of a shower and drying off. Claimant acquired a wrist brace.

¹ Claimant's Application for Hearing was amended to include not only her acute injury on January 20, 2007 but also a series of injuries ending on her last date of employment, approximately March 30, 2007. The ALJ's Award dealt only with the single acute injury of January 20, 2007 and was silent on the alleged repetitive injury claim.

² Again, the ALJ made this finding with respect to the January 20, 2007 injury only and made no findings with respect to claimant's repetitive injury claim.

Claimant sought additional treatment for her wrist complaints and in order to justify her request, she sought an evaluation with Dr. Munhall. He examined claimant on May 16, 2008 and diagnosed left wrist pain with deQuervains tendinitis and left median nerve irritation. He recommended that she have some diagnostic tests to rule out additional conditions. Dr. Munhall also concluded that there was a “causal relationship between Shelly Maytum's diagnoses and the injuries sustained on 1-20-07.”³ Dr. Munhall offered no opinion as to the nature of claimant's work activities, nor did he suggest that claimant's injury was the result of repetitive activities. To the contrary, he quite clearly opined that claimant's traumatic accident of January 20, 2007 led to her left wrist complaints.

The ALJ appointed Dr. Paul Stein to conduct an independent medical examination for the purpose of rendering an opinion as to the diagnosis of claimant's condition, as well as a causation opinion and treatment recommendations. Dr. Stein's report indicated that he could find no documentation or evidence within a reasonable degree of medical probability that claimant's current symptoms to her left wrist and hand were caused by the fall at work on January 20, 2007.

Following receipt of Dr. Stein's report, claimant's request for additional medical treatment was denied. The claim proceeded to a regular hearing and Dr. Munhall issued an opinion as to claimant's permanent impairment. He assigned a 19 percent to claimant's left upper extremity as a result of her accident.

Respondent deposed Dr. Stein and he confirmed his earlier opinions with regard to the lack of causal connection between claimant's January 20, 2007 accident and her left wrist complaints. But during cross examination, he did allow that *if* claimant testified that while working for respondent the pain worsened until she was placed in a brace and sent home, then it was more probable than not that her repetitive work activities either aggravated, accelerated or intensified her condition.⁴

After considering all the evidence the ALJ again denied claimant's request for benefits. She explained her decision as follows:

The Administrative Law Judge is persuaded by the medical records and deposition testimony of Dr. Paul Stein, the court appointed independent medical evaluator. Specifically, the Administrative Law Judge finds that claimant's left wrist symptoms were not caused by the fall at work on January 2, 2007 [sic].⁵

³ Munhall Depo. at 12.

⁴ Stein Depo. at 13-14.

⁵ ALJ Award (Mar. 5, 2009) at 4.

Claimant maintains the ALJ erred by failing to consider that aspect of her claim that asserts a repetitive series of injuries to her wrist following her acute injury of January 20, 2007. Claimant contends that she alleged and proved a series of accidents occurring after her January 20, 2007 accident in that she continued to work, thereby sustaining a series of repetitive injuries to her left wrist and hand. In support of this contention, claimant points to her testimony during her discovery deposition where she explained that after her accident in January, she returned to work but she believed her wrist gradually got weaker.⁶ She also testified that "[t]he more I would lift that meat and lifting heavy pans and dishes, it just kept getting weaker and weaker and weaker, and I finally went and got the brace..."⁷

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.⁸

The parties' stipulations make it clear that claimant was alleging not only an acute injury to her wrist on January 20, 2007, but an injury occurring each and every day thereafter. After considering the entirety of the record, the Board finds that claimant failed to meet her burden of proof of establishing that she sustained a series of repetitive injuries to her wrist as a result of her work activities up to her last date of work.

Respondent maintains claimant failed to sufficiently prove she sustained a series of repetitive injuries while working. In fact, respondent points to claimant's own medical evidence to contradict her assertions on this issue. Claimant sought an evaluation from Dr. Munhall and he opined that her wrist complaints were caused by her January 20, 2007 accident. He did not speak to a series of repetitive injuries much less even consider the nature of her job duties and their impact on her condition. Likewise, claimant's recitation of her injury during the process of her evaluation with Dr. Stein did not include any mention of work activities causing her increased pain or aggravating her symptoms. At nearly every juncture claimant points to the January 20, 2007 event as the source of her wrist complaints, even though the medical records indicate her physical symptoms with respect to her left wrist did not begin until shortly before March 30, 2007, approximately 2 months

⁶ Claimant's Depo. (Nov. 12, 2007) at 12, 25.

⁷ *Id.* at 39.

⁸ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

after her fall. And while it is true that claimant testified that her wrist gradually began to hurt while working, the Board is simply not persuaded by that testimony in light of the medical records and the medical testimony.

Under these facts and circumstances, the Board is unpersuaded that claimant met her burden of proving a series of repetitive injuries culminating on her last date of work in March 2007. Accordingly, claimant's claim is denied. The ALJ's Award is affirmed in so far as it denied benefits for an acute injury occurring on January 20, 2007. The Award is also modified to include the Board's finding that claimant failed to meet her burden of proof on an alleged series of repetitive injuries culminating on her last date of work in March 2007.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 5, 2009, is affirmed in part and modified in part denying claimant's claim for an alleged series of repetitive injuries culminating March 2007.

IT IS SO ORDERED.

Dated this _____ day of August 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge